IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION NO.11930 OF 2004

For Approval and Signature:

HON'BLE MR.JUSTICE K.S.JHAVERI

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

LAXMIBEN RAMESHBHAI NAGRANI

Versus

LALCHAND DHALUMAL JAMTANI

Appearance:

1. Special Civil Application No. 11930 of 2004

MS. S.M. AHUJA for Petitioner

MR. ASHOK YAGNIK for Respondent

CORAM : HON'BLE MR.JUSTICE K.S.JHAVERI

Date of decision: 03/05/2005

ORAL JUDGEMENT

1. By way of this petition, the petitioner has challenged the order dated 4th June, 2004 passed by the learned Judge, City Civil Court, Ahmedabad whereby the suit is dismissed for default and the order dated 29th July, 2004 passed by the learned Judge, City Civil Court, Ahmedabad below Application-Exh.46 preferred by the

original defendant in Civil Suit No.2080 of 2003 whereby the application for restoration of the original suit is rejected.

2. Heard Ms.S.M.Ahuja, learned Advocate for the petitioner, and Mr.Ashok Yagnik, learned Advocate for the respondent.

3. Ms.S.M.Ahuja, learned Advocate for the petitioner, submitted that the trial Court has committed an error inasmuch as Issue No.5 was framed pursuant to the written statement filed by the present petitioner, original defendant, whereby the issue regarding the forcible possession taken on 15th August, 2003, in absence of the present petitioner, was required to be decided. She, therefore, submitted that the impugned orders are required to be quashed and set aside and the suit is required to be restored to file.

4. Mr.Ashok Yagnik, learned Advocate for the respondent, original plaintiff, submitted that originally, the suit was filed by the respondent and since the suit is dismissed for default, the petitioner-original defendant cannot claim, as a matter of right, restoration of the suit. In that view of the matter, he has supported the orders passed by the trial Court and the reasoning given by the trial Court.

5. Heard the learned Advocates for the parties and perused the relevant record of the case. For deciding the dispute between the parties, Issue No.5 is relevant. Hence, the same is reproduced hereunder:

> "5. Whether defendant proves that on 15.8.2003 at 10 hours in absence of defendant, plaintiff and his associates broke open said shop and took away all the goods and articles lying in the shop forcibly and took the possession illegally?"

5.1 Perusal of the aforesaid Issue No.5 leads this Court to a prima facie opinion that the rights of the petitioner are affected by dismissing the suit for default. The trial Court ought to have restored the suit even for a limited purpose of deciding the Issue No.5 only. However, the trial Court has proceeded on a technical ground and has not allowed the application-Exh.46. In that view of the matter, the trial Court has committed an error in not allowing Application-Exh.46. Further, since Issue No.5 is required to be decided, Application-Exh.46 is required to

be allowed. The present petitioner, original defendant, may not suffer for fault of the plaintiff. Apart from that, no party should be allowed to take advantage of the legal proceedings.

5.2 At this stage, Mr.Yagnik, learned Advocate for the respondent, original plaintiff, submitted that if Exh.46 is allowed, then, the whole suit may be restored and the claim of the petitioner herein may be considered.

6. In view of the foregoing discussion, the present petition is allowed. Both the impugned orders are hereby quashed and set aside. The Application-Exh.46 is allowed. The suit is restored to original file. The trial Court is directed to decide the suit on merits. It is made clear that the trial Court will decide all issues on merits.

6.1 Since the suit is of the year 2003, the trial Court is directed to decide the same within six months, if it has ripe for hearing, otherwise within two years from the date of receipt of writ of this order.

6.2 Rule is made absolute to the aforesaid extent only. No order as to costs.

6.3 Office is directed to send the writ of this order forthwith.

[K.S.Jhaveri, J.]

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